Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 716

FRED STOVER,
Petitioner,

vs.

CENTRAL BROADCASTING COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OCTOBER TERM, 1956

No.....

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

A STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS SOUGHT TO BE INVOKED.

Petitioner seeks to invoke the jurisdiction of this Court under 28 U. S. C. Section 1257 (3).

Respondent respectfully submits that upon the record there is no federal question presented for review by the Supreme Court of the United States. No federal question was decided by the Supreme Court of Iowa and its decision rested exclusively upon state law.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner contends that the Fourteenth Amendment to the Constitution of the United States is involved.

Respondent respectfully submits that the Supreme Court of Iowa neither passed up the Constitutional provisions in question, nor was a decision based upon said Constitutional provision necessarily implied in the decision of the Supreme Court of Iowa.

QUESTIONS PRESENTED FOR REVIEW

Respondent respectfully submits that no federal question is presented for review by this Court.

This case arose and was decided in the following manner by the Supreme Court of Iowa:

1. March 13, 1954 plaintiff filed his Petition in State Court asking judgment for damages allegedly sustained as a result of a radio broadcast by the defendant in which the plaintiff alleged was falsely named a Communist. (Record pages 5 and 6)

2. August 31, 1954 respondent filed its Answer to the Petition of the plaintiff. (Record page 7)

3. August 31, 1954 defendant made application for permission to file in excess of thirty interrogatories under Rule 122 of the Rules of Civil Procedure of the State of Iowa, and a copy of the proposed interrogatories was attached. (Record page 11 to page 50)

4. September 30, 1954 petitioner filed a Resistance to the Application of respondent for permission to file in excess of thirty interrogatories. (Record page 56 to page 58)

5. November 22, 1954 the trial court permitted the filing of fifty-seven interrogatories and found fifty-one of them to be proper and ordered the respondent to answer the same. (Record page 102 to page 118)

6. December 16, 1954 petitioner filed in the trial court a Motion for reconsideration of the prior ruling which had been entered on November 22, 1954. (Record page 131 to page 137)

7. January 13, 1955 the trial court entered an Order overruling petitioner's Motion to reconsider the Order of November 22, 1954. (Record page 166 to page 168)

8. January 22, 1955 the Supreme Court of Iowa granted leave to petitioner to take an interlocutory appeal to that Court "to the extent that the plaintiff is permitted to appeal from the ruling and order of the District Court of Polk County, Iowa dated January 13, 1955 wherein said Court overruled plaintiff's motion to reconsider the Court's ruling filed November 22, 1954 requiring plaintiff to answer cer-

tain interrogatories noted in said ruling." (Record page 168)

9. January 26, 1955 plaintiff perfected his appeal to the Supreme Court of Iowa. (Record page 169)

10. On July 26, 1956 the Supreme Court of Iowa affirmed the decision of the trial court on two grounds based exclusively upon state law:

A. Plaintiff failed to lodge specific objections in the trial court against the interrogatories in question and therefore could not claim error.

B. No appeal lies to the Supreme Court of Iowa from an order overruling a motion to reconsider a previous ruling. (The opinion of the Supreme Court of Iowa is designated Appendix I in the Petition for Writ of Certiorari and is set out verbatim at pages 16 to 23 of said Petition and is reported in 78 N. W. 2d 1)

ARGUMENT

PROPOSITION

TO INVOKE THE JURISDICTION OF THIS COURT IT IS NOT SUFFICIENT THAT A FEDERAL QUESTION BE RAISED BELOW; IT IS ALSO ESSENTIAL THAT THE FEDERAL QUESTION BE DIRECTLY PASSED UPON BELOW AND THAT THE DECISION HAVE BEEN ADVERSE TO THE PETITIONER. BECAUSE THE SUPREME COURT OF IOWA PASSED UPON NO FEDERAL QUESTION AND BECAUSE THE DECISION OF THE SUPREME COURT OF IOWA WAS BASED EXCLUSIVELY UPON SUBSTANTIAL NON-FEDERAL GROUNDS, THIS COURT IS WITHOUT JURISDICTION.

Authorities

California Powder Works v. Davis, 1894, 151 U. S. 389, 14 Supreme Court 350, 38 L. Ed. 206.
Revised Rules of Supreme Court of the United States, No. 19.

Chesapeake and Ohio Railway Company v. McDonald, 1909, 214 U. S. 191, 29 Supreme Court 546, 53 L. Ed. 963.

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COMMENT

In order to invoke the jurisdiction of this court it is not sufficient that a federal question be raised below; it is also essential that the federal question be directly passed upon below and that the decision have been adverse to the petitioner. The authorities sustaining this position of respondent are numerous and unanimous.

The rules of this Court (No. 19) announce this principle by providing as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) *Where a state court has decided a federal question of substance* not theretofore determined by this

court, or has decided it in a way probably not in accord with applicable decisions of this court." (emphasis added)

In *California Powder Works v. Davis*, 1894, 151 U. S. 389, 14 Supreme Court 350, 38 L. Ed. 206, Mr. Chief Justice Fuller, speaking for the Court stated:

> "It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a State in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented. *Eustis v. Bolles*, 150 U. S. 361. It is equally well settled that where our jurisdiction depends upon the denial by a state court of a title, right, privilege, or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was specially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed. *Schuyler Bank v. Bollong*, 150 U. S. 85, 88."

Applying these well settled principles to the case at bar, it is readily apparent that the Supreme Court of Iowa neither considered nor decided any federal question and its decision was based exclusively upon procedural grounds arising under state law. Under such circumstances, this court has no jurisdiction. No. 19 of the Rules of this Court requires that before a review on writ of certiorari may be had the lower court must have decided a federal question of substance.

Petitioner apparently labors under an impression that the mere fact that he urged a point under the Federal Con-

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his Brief and Argument to the Supreme Court
nfers jurisdiction upon the Supreme Court of the
es to review the decision of the state court. How-
gant waives any federal right by ignoring state
rules which results in a failure to properly raise
question in the state court. Thus, in *Chesapeake*
Railway Company v. McDonald, 1909, 214 U. S.
preme Court 546, 53 L. Ed. 963, this Court said:

> "In *Harding v. Illinois*, 196 U. S. 78, it was held that a Federal constitutional objection might be waived, so far as having the right of review of a judgment in a state court was concerned, where the record in the case disclosed that the question was not made in the state court by proper procedure or argument in support of the assertion of the Federal question, and the state court had for that reason held the right to review the Federal question waived."

Likewise, in *Honeyman v. Hanan*, 1937, 300 U. S. 14, 57 Supreme Court 350, 81 L. Ed. 476; App. dismissed 302 U. S. 375, 58 Supreme Court 273, 82 L. Ed. 312, this court, speaking through Mr. Chief Justice Hughes, stated:

> "Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause."

In *Mellon v. O'Neil*, 1927, 275 U. S. 212, 48 Supreme Court 62, 72 L. Ed. 245, this Court said:

> "It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court."

The following quotation from *Capital National Bank of Lincoln v. First National Bank of Cadiz*, 1899, 172 U. S. 425, 19 Supreme Court 202, 43 L. Ed. 502, applies directly to the case at bar:

> "In our opinion no Federal right was specially set up or claimed in this case at the proper time or in the proper way; nor was any such right in issue and necessarily determined; but the judgment rested on non-federal grounds entirely sufficient to support it."

Reference to and quotation from the abundant decisions of this court affirming the foregoing principles would be superfluous. Each of the cases cited above recognizes and applies the proposition that this court is without jurisdiction to review a decision of a State Supreme Court (1) Where no federal question was decided below, or (2) Although a federal question was decided below, if the decision of the state court rested upon adequate non-federal grounds.

Reduced to its essential parts, this case arose in the following manner:

1. Plaintiff filed a tort action in libel.
2. Defendant, following state procedure, filed a number of interrogatories to be answered by the plaintiff.
3. The trial court overruled objections by the plaintiff to most of the interrogatories.
4. Plaintiff then amended his pleadings in the trial court and filed a motion for a reconsideration by the trial court of its order overruling objections to the interrogatories.
5. The trial court overruled the motion to reconsider.
6. Plaintiff appealed to the Supreme Court of Iowa from the order overruling the motion to reconsider and on the appeal urged, among other things, certain objections to the interrogatories which he claimed impinged on the Constitution of the United States.
7. The Supreme Court of Iowa affirmed the decision below on two grounds based exclusively upon state law:

A. Plaintiff failed to lodge specific objections in the trial court against the interrogatories in question and therefore could not claim error.

B. No appeal lies from an order overruling a motion to reconsider a previous ruling.

The Supreme Court of Iowa rested its decision exclusively upon the foregoing grounds and failed to decide any federal question whatsoever. Under this record, it is obvious that this court is without jurisdiction and that the petition for certiorari should be denied.

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JAMES J. LAMB

.....

PAUL F. AHLERS

Attorneys for Respondent.

I, ..., a member of the Bar of the Supreme Court of the United States, and attorney for FRED STOVER, petitioner, hereby accept service and acknowledge receipt of two copies of the foregoing Brief, this ..... day of February, 1957.

.....

Attorney for Petitioner.